

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

Richard A. Sly
1001 S.W. Fifth Avenue, Suite 310
Portland, Oregon 97204

Linda S. Ziskin
P.O. Box 2237
Lake Oswego, Oregon 97035

Attorneys for Plaintiff

Dwight C. Holton
UNITED STATES ATTORNEY
District of Oregon
Adrian L. Brown
ASSISTANT UNITED STATES ATTORNEY
1000 S.W. Third Avenue, Suite 600
Portland, Oregon 97204-2902

/ / /

/ / /

1 - FINDINGS & RECOMMENDATION

1 Lisa Goldoftas
2 SPECIAL ASSISTANT UNITED STATES ATTORNEY
3 Office of the General Counsel
4 Social Security Administration
5 701 Fifth Avenue, Suite 2900 M/S 221A
6 Seattle, Washington 98104-7075

7 Attorneys for Defendant

8 HUBEL, Magistrate Judge:

9 Plaintiff Paula Beyer brought this action for judicial review
10 of the Commissioner's decision to deny plaintiff supplemental
11 security income. The parties stipulated to a remand for additional
12 proceedings. Judgment was entered September 27, 2010.

13 Plaintiff now moves for an award of attorney's fees under the
14 Equal Access to Justice Act, 28 U.S.C. § 2412 (EAJA), in the amount
15 of \$5,386.54. Although defendant stipulates to the award, I
16 recommend that the motion be granted in part and denied in part,
17 and that plaintiff be awarded \$3,488.95 in EAJA fees.

18 EAJA requires an award of attorney's fees to prevailing
19 parties in civil actions against the United States unless the
20 position of the United States was substantially justified. 28
21 U.S.C. § 2412(d)(1)(A). Plaintiff was the prevailing party. I
22 construe defendant's stipulation to the fee motion as a concession
23 that the government's position was not substantially justified.

24 The court exercises discretion in awarding fees under EAJA.
25 See Rodriguez v. United States, 542 F.3d 704, 709 (9th Cir. 2008)
26 (court of appeals reviews district court award of fees under EAJA
27 for abuse of discretion); see also Webb v. Ada County, 195 F.3d
28 524, 527 (9th Cir. 1999) (district court possesses "considerable
discretion" in determining the reasonableness of a fee award). The
fee award is a combination of the number of hours reasonably

1 worked, multiplied by a reasonable hourly rate.

2 The attorney timesheet appended to plaintiff's motion shows
3 that attorney Linda Ziskin spent a total of 27.5 hours on this case
4 (2.2 hours in 2009, and 25.3 hours in 2010). Her co-counsel,
5 attorney Richard Sly, spent a total of 3.4 hours (1.9 hours in
6 2009, and 1.5 hours in 2010). The total hours for both lawyers is
7 30.9.

8 The parties entered into the stipulated remand in this case
9 after plaintiff filed a twenty-page opening memorandum which raised
10 several alleged errors by the Administrative Law Judge (ALJ)
11 including failing to properly consider the opinions of treating and
12 examining physicians, failing to assess all of plaintiff's
13 medically determinable impairments, rendering a flawed residual
14 functional capacity assessment, and failing to present a vocational
15 hypothetical to the vocational expert. The stipulated remand
16 requires the ALJ, on remand, to (1) hold a *de novo* hearing, (2)
17 further evaluate the medical source opinions of the consultative
18 psychologist and plaintiff's treating physician, (3) evaluate
19 plaintiff's diagnosed obesity, (4) evaluate a particular lay
20 witness statement, (5) reevaluate plaintiff's past relevant work,
21 credibility, and residual functional capacity, and (6) complete the
22 sequential evaluation process.

23 While plaintiff's counsel achieved a favorable result for
24 their client, the total hours are unreasonable given that the
25 government voluntarily agreed to a remand after the filing of the
26 opening memorandum. As Judge Mosman noted in a 2007 opinion,
27 "[t]here is some consensus among the district courts that 20-40
28 hours is a reasonable amount of time to spend on a social security

1 case that does not present particular difficulty." Harden v.
 2 Commissioner, 497 F. Supp. 2d 1214, 1215 (D. Or. 2007) (citing
 3 cases). Judge Mosman agreed that absent unusual circumstances or
 4 complexity, "this range provides an accurate framework for
 5 measuring whether the amount of time counsel spent is reasonable."
 6 Id. at 1216.

7 Here, if the case had not settled, plaintiff's counsel would
 8 have expended additional hours in filing a reply memorandum, making
 9 the total well into the upper end of the reasonable range. This
 10 case involved a fairly long record at almost 700 pages, and several
 11 discrete issues, but it was not unusual or complex.

12 The timesheet shows a few entries for purely administrative or
 13 clerical tasks which should not be considered compensable as
 14 attorney's fees. See Missouri v. Jenkins, 491 U.S. 274, 288 n.10
 15 (1989) ("purely clerical or secretarial tasks should not be billed
 16 at a paralegal [or lawyer] rate, regardless of who performs them.
 17 . . . [The] dollar value [of non-legal clerical work] is not
 18 enhanced just because a lawyer does it."); Gough v. Apfel, 133 F.
 19 Supp. 2d 878, 881 (W.D. Va. 2001) ("[p]urely clerical activities,
 20 regardless of who performs them, are considered overhead and are
 21 not compensable as EAJA attorney fees.").

22 The following billing entries are not subject to payment as
 23 EAJA attorney's fees:

24 0.2 hours by Sly on April 20, 2010, for docketing the opening
 25 brief;

26 0.1 hours by Ziskin on February 26, 2010, for receiving and
 27 docketing transcript;

28 0.1 of the 0.7 hours by Ziskin on June 21, 2010, for filing

1 the opening memorandum;

2 0.1 hours by Ziskin on August 9, 2010, for downloading an
3 electronic case filing notice; and

4 0.1 hours by Ziskin on September 27, 2010, for downloading the
5 court's judgment and calendaring for fees.

6 With more than one attorney working on a case, I review the
7 time spent for any overlapping time. While co-counsel must work
8 together, which requires time spent meeting and talking, it is
9 inappropriate to expect reimbursement from the opposing party for
10 both counsel's time. Here, Sly spent 0.7 hours on May 28, 2009,
11 reviewing the file after the Appeals Council's denial and
12 determining whether to proceed with a federal court complaint and
13 the *in forma pauperis* affidavit. Subsequent entries make clear
14 that he did not actually draft the complaint on that date because
15 he separately billed, on following dates, time for discussing the
16 process of filing a complaint with his client, proceeding with the
17 *in forma pauperis* affidavit and the complaint, and then getting an
18 extension from the Appeals Council for filing the case here.

19 Ziskin also spent time on reviewing the file and evaluating
20 the case. On August 11, 2009, she spent 2.2 hours evaluating the
21 case, reviewing the Appeals Council's decision, conferring with
22 Sly, and conferring with the client. Thus, the record shows that
23 both Sly and Ziskin are billing for time spent on the same task,
24 namely reviewing the Appeals Council's decision and evaluating the
25 case for filing in federal court. I deduct the full amount of time
26 billed by Sly on May 28, 2009, and award the 2.2 hours to Ziskin.

27 On September 13, 2010, Sly billed 0.4 hours for conferring
28 with Ziskin regarding defendant's proposed remand. Ziskin lists

1 0.8 hours on "9/11-9/14/10" for time spent on emails regarding the
2 stipulated remand, conferring with lead counsel and the client,
3 responding to defendant, and accepting the offer. Thus, both
4 Ziskin and Sly bill for the same task of evaluating the remand
5 offer and conferring with each other. I deduct the full amount of
6 time billed by Sly on September 13, 2010, and award the 0.8 hours
7 to Ziskin.

8 Finally, Ziskin spent a total of 23.3 hours in reviewing the
9 transcript, outlining the ALJ's decision, and working on the
10 opening memorandum.¹ As noted above, while the record was long and
11 counsel achieved a positive result for their client, this is simply
12 an unreasonable amount of time to spend preparing for and drafting
13 a twenty-page opening memorandum which presented no complex or
14 unique issues. I recommend concluding that 14 hours is a
15 reasonable amount of time. Thus, I deduct 9.3 hours from Ziskin's
16 time.

17 After making the above deductions, the amount of time allowed
18 is as follows: 1.2 hours for Sly in 2009; 0.9 hours for Sly in
19 2010; 2.2 hours for Ziskin in 2009; 15.6 hours for Ziskin in 2010.
20 The total number of hours allowed is 19.9.

21 EAJA sets a ceiling of \$125 per hour "unless the court
22 determines that an increase in the cost of living . . . justifies
23 a higher fee." 28 U.S.C. § 2412(d)(2)(A). To adjust for the cost
24 of living, the Ninth Circuit applies the consumer price index for
25

26 ¹ 23.3 hours is the sum of her billing entries from June
27 16, 2010, June 17, 2010, June 18, 2010, June 20, 2010, and June
28 21, 2010, less the 0.1 of the 0.7 billed on June 21, 2010, which
was already deducted as clerical.

1 all urban consumers (CPI-U). Jones v. Espy, 10 F.3d 690, 692-93
 2 (9th Cir. 1993) (CPI-U for all items, not just legal services,
 3 applies).

4 The EAJA-adjusted hourly rate for 2009 is 172.24², and for
 5 2010 is 175.96³. Multiplying the total number of 2009 hours (3.4)
 6 by the 2009 rate produces the sum of \$585.61. Multiplying the
 7 total number of 2010 hours (16.5) by the 2010 rate produces the sum
 8 of \$2,903.34. The total for both years is \$3,488.95.

9 CONCLUSION

10 I recommend that plaintiff's motion for EAJA fees [23] be
 11 granted in part and denied in part and that plaintiff be awarded
 12 \$3,488.95 in fees.

13 SCHEDULING ORDER

14 The Findings and Recommendation will be referred to a district
 15 judge. Objections, if any, are due March 15, 2011. If no
 16 objections are filed, then the Findings and Recommendation will go
 17 under advisement on that date.

18 / / /

19 / / /

20 / / /

21
 22 ² The CPI-U for 2009 is 214.537 (table available at
 23 <http://www.bls.gov/cpi/#tables>), making \$172.24 the adjusted
 24 hourly rate for 2009. See Ramon-Sepulveda v. INS, 863 F.2d 1458,
 25 1463 n.4 (9th Cir. 1988) (explaining formula as EAJA ceiling
 presently \$125/hour), x the CPI-U for current month/CPI-U for
 month Congress adopted current ceiling. 155.7 is the CPI-U for
 March 1996, the month Congress adopted the \$125/hour rate).

26 ³ The CPI-U for December 2010 (the most recent month for
 27 which information is available) is 219.179. The adjusted hourly
 28 rate for 2010 is \$175.96.

If objections are filed, then a response is due April 1, 2011. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

IT IS SO ORDERED.

Dated this 25th day of February, 2011

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge